89-1333

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1989

CLEMMIE SANDERS,
Petitioner,

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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17 pp

QUESTION PRESENTED FOR REVIEW

Whether the opinion of the Fifth Circuit upholding the District Court's finding of no racial discrimination and pretextual discharge can be upheld on a record which can only leave "...the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Company, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed.2d 746, 766 (1948).

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi, Jackson Division, rendered on January 27, 1987, was not reported and is set forth in the appendix at A-1.

The opinion of the United States Court of Appeals for the Fifth Circuit, rendered October 18, 1989, was not reported and is set forth in the appendix at A-72.

The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing, rendered November 17, 1989, was not reported and is set forth in the appendix at A-104.

JURISDICTION OF THE COURT

The judgment of the United States

Court of Appeals for the Fifth Circuit was entered on October 18, 1989. (A-72) The order denying a petition for rehearing was entered on November 17, 1989. (A-104)

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit under 28 U.S.C. §1254(1).

STATUTES INVOLVED

§703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) provides, in pertinent part:

> It shall be an unlawful employment practice for an employer...to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

§704(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a) provides, in

pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter....

42 U.S.C. §1981 provides, in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioner Clemmie Sanders was hired by South Central Bell in a craft position as a frame attendant on August 20, 1970. In 1971, he unsuccessfully sought a craft promotion, after which he filed a charge of discrimination with the Equal Employment Opportunity Commission. The EEOC ultimately issued a right to sue letter on this charge on December 20, 1986, but on December 1, 1974, Mr. Sanders had been promoted to switchman, mooting the issue.

From 1977 until his termination in 1983, Mr. Sanders was employed in a management position. All such employees' performance was evaluated by criteria delineated in the publication Performance and Potential Evaluation Procedure,

under which an "outstanding" performance was rated numerically from 100 to 110, a "good" performance rating was defined as one from 91 to 100, a "satisfactory" performance was from 81 to 90, and 80 and below was considered "unsatisfactory." Under this system, Mr. Sanders never received an unsatisfactory rating until September of 1983, at the time of his discharge, which his evaluations corroborate:

1977, G-93
1978-79, S-90 (changed from G-93)
1980-81, S-90
1981, S-90 (changed from G-96)
1981-82, G-93
1983, U-80

Mr. Sanders was initially assigned to Dispatch and Administration, then was transferred in June of 1980 to the Switching Control Center. That fall, he was assigned to work the midnight to

eight shift, and he began receiving threatening notes with racial overtones. After numerous requests for transfer, he was loaned to the Network Service Center in 1981, where he worked until he returned to the Switching Control Center some nine months later.

Mr. Sanders' personnel file was handled unusually. For example, in February of 1982, a conversion was discussed with him, and he was relieved of that assignment. However, this was not recorded in his personnel file until February of 1983, an unusual delay.

Also of importance is that a number of South Central Bell's records were not produced until trial. Among these were private files kept by one of his supervisors in his desk.

In the summer of 1983, Mr. Sanders was made a building manager, and, after a strike that fall, he was terminated. The evaluation under which he was terminated, an 80 for July 31, 1982-June 30, 1983 was completed by one of his supervisors, Ross Taylor on July 12, 1983 and signed by another supervisor, Hal Moss the same day, but it was not reviewed with Mr. Sanders until September 26, 1983. It appears more than coincidence that the evaluation was not made known to Mr. Sanders until after the strike, so that South Central Bell received the benefit of his technical expertise during the strike, and then fired him immediately after it was resolved.

The reason assigned by Ross Taylor

for discharging Mr. Sanders was falsification of personnel records and poor performance. Though Mr. Taylor also said that petitioner could be discharged for lack of technical competence, he never told Mr. Sanders that he was technically incompetent. Moreover, petitioner was not terminated until Mr. Taylor had requested and received the transfer of another black employee into his group. Prior to that event, Mr. Sanders was the only black employee in the group.

ARGUMENT

Petitioner accepts the burden of showing that the ultimate issue presented is whether or not there was intentional discrimination under Title VII, and that the trial court's factual find-

ings must be accepted, unless, under Rule 52(a) of the Federal Rules of Civil Procedure, they are are "clearly erroneous." Such a fact finding is clearly erroneous "...when although there is evidence to support it, a reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Company, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed.2d 746, 766 (1948).

Despite this burden, petitioner submits that this is such a case. While the trial court found that petitioner could not master his job, lack of technical expertise was not given as a ground of discharge, and Mr. Sanders' expertise was utilized extensively in

the strike immediately preceding his dismissal. Moreover, South Central Bell's evaluation system, while complex, was inconsistently applied to Mr. Sanders and was merely a pretextual excuse for his discharge, as shown by changes in the ratings assigned by his immediate superiors and the maintenance of private files outside the course of normal company records.

In his finding that petitioner was not discriminated against in his discharge, the trial judge found that Mr. Sanders simply could not master the complex technological changes constantly occurring in his work. However, lack of technical confidence was not assigned by South Central Bell as a ground of discharge. In fact, Mr. Taylor testified

that he never told Mr. Sanders that he was not technically competent.

This is compounded by South Central Bell's utilizing petitioner's technical expertise during the strike immediately prior to his discharge. Finally, lack of technical competence can scarcely be at at issue since, immediately after Mr. Sander's discharge, he was replaced by two white female frame attendant supervisors.

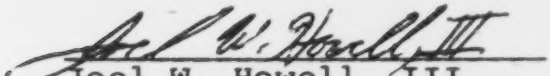
CONCLUSION

Petitioner submits that this record makes for a case that should be decided in a vein similar to Sylvester v. Callon Energy Services, Inc., 781 F.2d 520 (5th Cir. 1986), where the Court applied the clearly erroneous standard and found that reversal of a bench trial ruling

for the employer could not stand because "...the entire record does not support two permissible views of the evidence and...a mistake has been committed in this case." (781 F.2d at 524)

The Sylvester court examined the trial court's conclusion and found that appellant there clearly showed that he was a victim of racial discrimination. (781 F.2d at 525-526) Here, South Central Bell's explanations are not borne out by the record, so that this Court must find that the trial court's findings regarding the liability issues were clearly erroneous, as was the Fifth Circuit's decision to affirm those findings.

Respectfully submitted,



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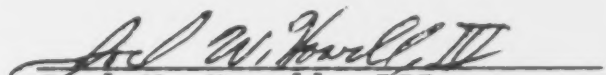
CERTIFICATE OF SERVICE

I, Joel W. Howell, III, of counsel, do hereby certify that I have caused to be delivered three (3) copies of the foregoing Brief of Petitioner to Paul O. Miller, III, Esq., P.O. Box 55507, Jackson, MS 39296-5507, this the __th day of February, 1990.



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